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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

Opposition to Motion for Leave to File Amended Answer Setting Forth Counterclaim and Amending Previous Answer and Points and Authorities in Support Thereof

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INTRODUCTION

Defendant State of Nevada, through its motion for leave to file amended answer and counterclaim, is seeking to introduce totally new issues and to confuse existing issues by the introduction of new legal theories which plaintiff State of California believes have no merit. The nature and scope of this original action is briefly set forth in the introduction to plaintiff's statement in support of its motion for leave to file complaint. It was stated therein: "This is an action by the State of California against the State of Nevada to establish the California-Nevada boundary *from Lake Tahoe to the Oregon border.*" (Emphasis added.)

The purpose of seeking the original jurisdiction of the Supreme Court in this matter was to achieve an expedient and decisive resolution of a potentially serious conflict over the location of the lawful boundary between the two states along the meridian of one hundred twenty degrees longitude west from Greenwich. This is the heart of the dispute before the Court.

The history of such controversy is set forth in plaintiff's motion for leave to file complaint and, therefore, will not be restated herein. Suffice it to say, however, notwithstanding over 100 years of common recognition by both states of the line surveyed by Allexey Von Schmidt in 1872, there is uncertainty as to whether or not this line has become the legally enforcible boundary between the states from Lake Tahoe to the Oregon border. This uncertainty is important to resolve without delay, particularly in the vicinity of the populous north shore of Lake Tahoe, in order to eliminate the potentiality for confusion in the enforcement of civil and criminal laws of the respective states and their local instrumentalities. Were it not for the need for prompt clarification it is likely that the parties would have resorted to compact legislation to resolve the matter.

By contrast, neither plaintiff nor defendant has produced or found any evidence of controversy over the location of the interstate boundary south of Lake Tahoe to the Colorado River. It is precisely because of the absence of any such controversy that plaintiff chose not to include that boundary in its complaint. Plaintiff submits that in all probability it was for the very same reason the defendant chose not to include the matter in any pleading at the time it filed its answer.

The issues between the parties have heretofore been quite clear and are set forth in their initial pleadings. Plaintiff

seeks to have the Court decree the eastern boundary of California between the thirty-ninth and forty-second degrees of north latitude is that line surveyed by Allexey Von Schmidt in 1872 on the basis alleged that California has exercised dominion, jurisdiction and control for 105 years to this line. Defendant, on the other hand, seeks to have the Court decree that this boundary is that line surveyed by Houghton and Ives in 1863 on the basis that it is the only line statutorily recognized by the two states as their respective mutual boundaries in the area in question. In fact, defendant states in paragraph X of its answer: "The State of Nevada alleges that only two lines are in contention, those being the 'Houghton-Ives' line and the 'Von Schmidt' line."

Nevada now seeks to expand its claim relating to the boundary north of the thirty-ninth degree north latitude and to expand the litigation to include the oblique portion of the boundary, i.e., that portion of the boundary extending in a southeasterly direction between the point of intersection of the one hundred-twentieth degree of west longitude and the thirty-ninth degree north latitude and the point of intersection of the Colorado River and the thirty-fifth degree north latitude. For the reasons stated at length below this proposed expansion of the issues should not be permitted.

LEAVE TO AMEND MAY BE DENIED IN THE DISCRETION OF THE COURT

Defendant, in its memorandum of points and authorities, is asking the Court to grant leave to amend its answer by adding a counterclaim omitted from its initial pleading under the provisions of rules 13(f) and 15(a) of the Federal Rules of Civil Procedure. As defendant has essentially pointed out, the spirit of the rules as expressed in their

provisions and as interpreted by the courts is to freely and liberally allow the amendment of pleadings for the purpose of bringing all appropriate issues and facts before the court when it will serve the interests of justice. (*Foman v. Davis* (1962) 371 U.S. 178; *Dombrovskis v. Murff* (S.D. N.Y. 1959) 24 FRD 302; 3 Moore's Federal Practice (2d ed. 1974) par. 15.08; 7 Volz, West's Federal Practice Manual (2d ed. 1970) par. 7984.)

Notwithstanding the liberal policy with respect to the amendment of pleadings, the courts will exercise discretion to determine whether or not an amendment is meritorious and they may deny leave to amend for good or sufficient reason. The courts have commonly refused to grant leave to amend when the amendment is unduly delayed, not offered in good faith, would cause undue prejudice to the other party, or when it is legally insufficient to support a valid claim. (3 Moore's Federal Practice (2d ed. 1974) par. 15.08.)

A. The Amendment Would Prejudice Plaintiff

Plaintiff believes that defendant's counterclaim would prejudice plaintiff because it would unnecessarily prolong the litigation by introducing extraneous new matter. Not only would the counterclaim obfuscate the issues and the facts presently before the Court, but it would create the necessity for further, time-consuming discovery.

B. The Counterclaim Is Legally Insufficient

As set forth in more detail below, plaintiff believes the new matter contained in defendant's counterclaim is not meritorious as it lacks legal sufficiency. There is ample authority for a court's refusal to grant leave to amend a pleading when the amendment is clearly without legal merit

(*Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.* (E.D.Pa. 1969) 309 F.Supp. 1057; *Kaplan v. United States* (C.D.Cal. 1967) 42 F.R.D. 5; *U. S. v. Two Lots of Ground* (E.D.Pa. 1962) 30 F.R.D. 5); or, in the absence of facts, to support a proposed counterclaim (*Browne-Vintners Company, Inc. et al. v. National Distillers Products Corp.* (S.D.N.Y. 1953) 15 F.R.D. 205). *Philadelphia Housing Atuhority, supra,* is analogous to the situation at hand because the proposed amendment would have involved the prolongation of discovery. The court stated as follows:

> "When leave to amend is sought to assert claims devoid of foundation, it should be denied, particularly where, as here, the statement of claims in the complaint is the stepping off point for very far-reaching discovery." (309 F.Supp. at p. 1064.)

Notwithstanding the application of Federal Rules of Civil Procedure to ordinary cases, this Court has given the rules special application in cases within its original and exclusive jurisdiction. In the case of *Ohio v. Kentucky* (1973) 410 U.S. 641, the question before the Court was the location of the boundary between those two states where they were separated by the Ohio River. Federal navigational projects between 1910 and 1929 had caused the waters of the river to rise and permanently inundate various areas of both Ohio and Kentucky. Ohio claimed that the northern boundary of Kentucky was along the northerly low-water mark of the Ohio River as it existed in 1792, the year Kentucky became a state. Kentucky claimed that its northern boundary was along the northerly low-water mark of the river as it existed under the changed conditions. Ohio then sought to amend its complaint by asserting that the boundary between it and Kentucky was the middle of the Ohio River or,

alternatively, the 1792 low-water mark on the northerly shore. The Court, in denying Ohio's motion for leave to amend, stated as follows:

> "We need intimate no view on the merits of Ohio's historical analysis for the state's long acquiescence in the location of her southern border at the northern edge of the Ohio River, and her persistent failure to assert a claim to the northern half of the river, convince us that she may not raise the middle-of-the-river issue at this very late date." (410 U.S. at p. 649.)

In analyzing the procedures applicable to its consideration of the motion for leave to file an amended complaint, the Court stated as follows:

> "Accepted procedures for an ordinary case in this posture would probably lead us to conclude that the motion for leave to file should be granted, and the case would then proceed to trial or judgment on the pleadings. This, however, is not an ordinary case. It is one within the original and exclusive jurisdiction of the Court. Const., Art. III, § 2; 28 U.S.C. § 1251(a). Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure. See United States Supreme Court Rule 9; *Rhode Island v. Massachusetts,* 14 Pet. 210 (1840). Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. See, for example, *Alabama v. Texas,* 347 U.S. 272 (1954); *California v. Washington,* 358 U.S. 64 (1958); *Virginia v. West Virginia,* 234 U.S. 117, 121 (1914). Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly

add to the expense that the litigants must bear." (410 U.S. at p. 644.)

The case of *Ohio v. Kentucky* has direct application to this case and is authority for denying leave to amend pleadings when such amendment would offer nothing of merit to the action.

Defendant's proposed amended answer and counterclaim fails to state meritorious claims for the following reasons:

COUNT I

Count I of Nevada's proposed counterclaim alleges that the boundary line between the States of Nevada and California was established by a survey conducted by California Surveyor General J. F. Houghton and Butler Ives, the Boundary Commissioner of the Territory of Nevada. (Count I, par. I, p. 8.)

This amendment should not be permitted. Nevada's claim to the portion of the line north of the thirty-ninth degree of north latitude based on the Houghton-Ives survey is already in issue. (Defendant's answers, pars. IV-XI and prayer, pp. 3-7.) Therefore, count I adds nothing to the case as it relates to this segment of the boundary. Nevada's proposed amendment in count I relating to the oblique portion of the boundary should not be permitted as it fails to state facts entitling Nevada to relief.

The line presently observed by both states as the oblique boundary is the line surveyed and marked by the United States Coast and Geodetic Survey between 1893 and 1900. During the past 78 years the substantial accuracy of this survey has not been questioned. More importantly, during this period of time both states have used and relied upon this line without interruption. Furthermore, both states

have adopted this line by statute as the oblique portion of their common boundary (Cal. Stats. 1901, ch. 73, p. 89; Nev. Stats. 1903, ch. 15, p. 38. See exhibit A and exhibit B attached.)

Nevada now attempts to manufacture a new oblique boundary line out of whole cloth asserting no facts which would provide a legal basis for its recognition. The proposed "line" begins with the 100 miles of the oblique boundary surveyed by Houghton and Ives (proposed amended answer and counterclaim count I, par. III, p. 9). To concoct the remaining three-quarters of the boundary, Nevada suggests that a theoretical line be drawn connecting the Houghton and Ives point of termination and a point set by compact between California and Arizona and Arizona and Nevada. (Proposed amended answer and counterclaim, count I, pars. III-IV, pp. 9-10, and prayer, p. 15.)

There is no authority whatever for the establishment of the "line" proposed in count I. It is clear from a careful reading of the interstate boundary cases that the boundaries between states are those described in the legislation creating the states (*Oklahoma v. Texas,* (1926) 272 U.S. 21, 49) unless a new boundary line has been established by operation of facts giving rise to the doctrine of acquiescence (*Ohio v. Kentucky, supra,* 410 U.S. 641, 651; *Maryland v. West Virginia* (1910) 277 U.S. 1, 42; *Indiana v. Kentucky* (1890) 136 U.S. 479, 510; *Virginia v. Tennessee* (1893) 148 U.S. 503, 522). The Court explained this doctrine in *Oklahoma v. Texas, supra,* 272 U.S. at page 44:

> "It is well settled that governments, as well as private persons, are bound by the practical line that has been recognized and adopted as their boundary, *Missouri v. Iowa,* 7 How. 600, 670, 12 L. Ed. 861; *New Mexico v. Colorado,* 267 U.S. 30, 40, 45 S. Ct. 202, 69 L. Ed. 499; and that a boundary line between two

governments which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by them for a long course of years, is *conclusive*, even if it be ascertained that it varies somewhat from the correct course, the line so established taking effect in such case, as a definition of the true and ancient boundary, *Virginia v. Tennessee*, 148 U.S. 503, 522, 13 S. Ct. 728, 37 L. Ed. 537; *Maryland v. West Virginia*, 277 U.S. 1, 42, 30 S. Ct. 268, 54 L. Ed. 645; *New Mexico v. Colorado supra*, at page 40 (45 S. Ct. 202)." (Emphasis added.)

If the facts are insufficient to demonstrate that a new boundary has been established by prescription or acquiescence, the described boundary continues to be the legal boundary between the states. Thus in *Oklahoma v. Texas, supra*, after the Court concluded that the interstate boundary had not been established by acquiescence, it ordered an accurate survey of the true one hundredth meridian. (*Oklahoma v. Texas, supra*, 272 U.S. at p. 49.)

Nevada has not alleged any facts which would establish prescriptive rights in the "line" proposed in count I. The facts alleged reveal that the "line" has not been run out and marked on the ground as required before prescriptive rights in a boundary can be acquired. Furthermore, no practical use of this "line" as the boundary has been alleged. Though it is contended that the states adopted the line as their boundary by statute (proposed amended answer and counterclaim, count I, par. I, p. 8), it is clear that California adopted only so much of the line as had been *actually surveyed* by Houghton and Ives. (Cal. Stats. 1864, ch. 455, pp. 506-507. See exhibit C attached.) Furthermore, as previously noted, both states subsequently adopted the United States Coast and Geodetic Survey as the oblique boundary. (See exhibit A and exhibit B attached.)

Since defendant State of Nevada has not stated facts sufficient to show that this "line" has been established by prescription or by operation of the doctrine of acquiescence, the only other possible basis for its recognition is that this "line" is the accurate location of the boundary described in California's Constitution and referenced in Nevada's Constitution, i.e., the line extending between the point of intersection of the true one hundred twentieth meridian and the true thirty-ninth degree of north latitude and the point of intersection of the thirty-fifth degree of north latitude with the Colorado River. Defendant has not so alleged.

In short, the allegations of count I fail to state any facts demonstrating that Nevada is entitled to a decree establishing the proposed line as the oblique portion of the California-Nevada boundary. The proposed amendment should therefore be denied.

COUNT II

Defendant State of Nevada's count II suffers from the same defects as count I. It fails to state any facts showing that Nevada is entitled to the relief requested.

In count II Nevada asks the Court to devise a boundary by connecting with lines three points: a point set by Daniel Majors in connection with the survey of the Oregon-California boundary; the unlocated point where a line drawn due south from Majors' point would intersect the thirty-ninth degree north latitude; and, a point allegedly set by Lieutenant Ives at the Colorado River.

There is no authority for the establishment of such a peculiar boundary. The existing authority is quite to the contrary.

The argument that establishment of a monumented point creates an interstate boundary line was directly considered

and rejected in *Oklahoma v. Texas, supra,* 272 U.S. 21. Texas argued that its common boundary with Oklahoma along the north-south segment of the panhandle should be established as a line running due north from a point known as the Kidder Monument set by a surveyor commissioned by the Department of Interior to set the point of intersection of the true one hundredth meridian with the South Fork of the Red River and adopted by Congress as such. The Court rejected the argument of Texas and, as previously noted, ordered a resurvey using more accurate, modern techniques. (At p. 49.)

Furthermore, count II like count I fails to state any facts which would show any other basis for a decree establishing this "line" as the boundary. It is not alleged that the proposed line would more accurately identify the boundary described in the states' constitutions nor is it alleged that the line has been acquiesced in.

COUNT III

The part of the boundary line north of the forty-second degree north latitude surveyed by Allexey Von Schmidt is already in issue. In its initial pleading, the State of California has alleged that this line has become the interstate boundary north of the forty-second by operation of facts giving rise to the doctrine of acquiescence. (Plaintiff's complaint, pars. VII-XI, pp. 3-5.) Therefore, Nevada's purported amendment adds nothing to the case as it relates to the Von Schmidt survey of the northern segment of the boundary.

Nevada's allegations as to the Von Schmidt survey of the oblique boundary suffer from essentially the same defects as the other counts. There are no allegations that this survey is an accurate delineation of the described boundary

and there are no allegations of facts giving rise to the operation of the doctrine of acquiescence.

Nevada's allegations in each count relating to violations of article IV, section 3 of the United States Constitution and the 10th amendment thereto add nothing to its claims. The apparent argument is that interference with a surveyed or partially surveyed boundary line is an interference with a state's sovereign powers and, therefore, unconstitutional.

Such an argument is clearly without merit. There is no authority for the proposition that the mere act of surveying a point or a line fixes the boundary of a state or establishes any other sovereign rights. It follows, therefore, that absent facts showing that the line is entitled to enforcement by virtue of its accuracy or by operation of the doctrine of acquiescence, no interference with sovereign rights results from the correction, alteration, obliteration or abandonment of the line.

CONCLUSION

Each of the amendments proposed by Nevada is without merit and will serve only to confuse and delay timely resolution of this suit. Plaintiff therefore respectfully requests that the Court follow the precedent set in *Ohio v. Kentucky, supra,* 410 U.S. 641, and deny leave to amend.

DATED: April 25, 1978.

Respectfully submitted,

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